

February 5, 2009

**OFFICE OF THE HEARING EXAMINER  
KING COUNTY, WASHINGTON**

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**REVISED ORDER OF REMAND TO APPLICANT AND  
DEPARTMENT FOR FURTHER ANALYSIS**

**SUBJECT:** Department of Development and Environmental Services File No. **L08TY402**  
Proposed Ordinance No. **2008-0498**

**SINNER REZONE**  
Rezone Application

**Location:** 19506 Vashon Highway Southwest

**Appellant:** Loren Sinner  
*represented by* **Michael Bradley**  
Sound Consulting  
26425 Wax Orchard Road  
Vashon, Washington 98070

**King County:** Department of Development and Environmental Services (DDES)  
*represented by* **Mark Mitchell**  
900 Oakesdale Avenue Southwest  
Renton, Washington 98055  
Telephone: (206) 296-7119  
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**SUMMARY OF RECOMMENDATIONS/ORDER:**

Department's Preliminary Recommendation:	Approve, subject to conditions
Department's Final Recommendation:	Approve, subject to conditions
Examiner's Order:	Remand to applicant and department for further analysis of rezone compliance

**EXAMINER PROCEEDINGS:**

Hearing Opened:	October 16, 2008
Hearing Closed:	October 16, 2008

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

**FINDINGS, CONCLUSIONS & DECISION:** Having reviewed the record in this matter, the Examiner now makes and enters the following:

**FINDINGS:**

1. General Information:

A request for a zone reclassification of 2.28 acres from R-1-SO (Residential, one dwelling unit per acre within a Special District Overlay area) to CB (Community Business)

Location:	North side of Cemetery Road SW, just east of 19506 Vashon Highway SW, Vashon
Applicant:	Loren Sinner L.S. Cedar Co. P.O. Box 128 Vashon, WA 98070
King County Action:	Zone Reclassification
File Number:	L08TY402
Existing Zone:	R-1-SO
Requested Zone:	CB
Community Plan:	Vashon
Section/Township/Range:	NW 5-22-03 / Parcel No.: 0522039018
Threshold Determination:	Determination of Nonsignificance (DNS), September 15, 2008

- The subject property, the easterly Lot 2 of a two-lot short plat (file KCSP 580018, recorded under 8105290584), lies on the north side of SW Cemetery Road just east of Vashon Highway, on Vashon Island. The area surrounding the two roads' intersection is known as "Vashon Center" or simply "Center." The property is 2.28 acres in area and rectangular in shape, slightly greater in length in the east-west dimension. Its terrain has a gentle grade descending generally to the east. Site vegetation includes trees and grassy understory. No environmentally critical areas are found to be located onsite or in immediate proximity, although there is a seeming discrepancy in the record in such regard. (The discrepancy need not be resolved in this rezoning consideration. The Applicant should note, however, that the proposed rezoning action would in no way preempt or exempt the property from the applicability of critical areas regulations (and any other regulations<sup>1</sup>) to the use and development of the property.)
- The property abuts the east side of a commercially-zoned<sup>2</sup> parcel (Lot 1 of the short plat) owned by the Applicant, on which the Applicant operates a commercial business (L.S. Cedar Company) of the sale of construction lumber and associated building materials. The property lies on the eastern fringe of the Vashon Center commercial/industrial node, which is the southerly and smaller of two commercial/industrial nodes of business-related land uses along Vashon Highway in the "town" area of Vashon Island (the other being the larger northern node ("Vashon")),

<sup>1</sup> Of course, accounting for the zone reclassification.

<sup>2</sup> Zoned CB-P-SO, a commercial business (CB) zoning with the conditioning "P-suffix" and with the Special District Overlay. See Finding 10 regarding the suffix and overlay.

separated for a short distance from the subject Vashon Center node by an intervening area of non-commercial uses). The property adjacent to the east is used residentially (and is also owned by the Applicant).

4. Vashon Highway is designated as a highway and SW Cemetery Road as a principal arterial road in the county's transportation plan. Both roads are improved to rural standards (without curb, gutter and sidewalk) with two-lane blacktop.
5. The zoning of the property is currently R-1-SO (Residential, one dwelling unit per acre, with the Special District Overlay area; see Finding 10A).<sup>3</sup> Areas to the north are also zoned R-1-SO, while areas to the east and south are zoned Rural Area-10-SO. The properties in the immediate quadrants of the SW Cemetery Road/Vashon Highway intersection are all zoned CB-P-SO, including the Applicant's commercial business property immediately to the west as noted above. West of the intersection lie areas of industrial zoning (I-P-SO), as well as some residential zoning.
6. The Applicant requests rezoning<sup>4</sup> of the property to CB (Community Business). The application is not accompanied by a formal development plan (such as a rezone site plan). No structural development is proposed at present for the property. The Applicant desires to use the property for expansion of the adjacent lumber/building materials business, limited to open lumber storage.
7. Domestic water service, sufficient fire flow and sanitary sewer service are documented as available to the property.
8. The comprehensive plan land use designation of the property is Rural Town, assigned by the 2004 general comprehensive plan and the 1996 Vashon Town Plan (a subarea plan which is formally a part of the comprehensive plan). The requested CB zone is a permissible implementing zone of the Rural Town designation. (Comprehensive Plan, p. 9-2)
9. The proposed rezone is not in conflict with any relevant comprehensive plan and town plan policies (see, particularly, Comprehensive Plan, pp. 3 - 20-21 and 8 - 32-35, and Town Plan, pp. 7-8).
10. Commercial zoning and development in the subject area are subject to two special zoning caveats:
  - A. The Special District Overlay noted above (SO-140) regarding groundwater protection (which applies island-wide).
  - B. VS-P29, a "P-suffix" development standard<sup>5</sup> which limits commercial business (CB) zoning and development within the Rural Town land use designation by a more restrictive use allowance than is generally the case with CB-zoned properties.<sup>6</sup> DDES's analysis of the effect of the P-suffix development standard VS-P29 on the proposal

<sup>3</sup> The property subject to the rezone proposal was characterized by DDES at hearing as "split-zoned," but that characterization is inaccurate. DDES may have been referring to the different zoning applied to the two lots of the short plat, but that is not split-zoning; neither lot is split-zoned – the zoning boundary runs along the common lot boundary of the two lots.

<sup>4</sup> The regulatory terms "rezone," "rezoning" and "reclassification" are all forms of formal "zone change" and are used interchangeably here. The county code formally uses the term "reclassification." [See, *e.g.*, KCC 21A.44.060]

<sup>5</sup> Enacted in Ordinance 12824 and codified by reference in KCC 21A.38.030.

<sup>6</sup> The P-suffix restriction has the legal effect of disallowing land uses inconsistent with VS-P29 regardless of a general rezone to CB.

concludes that the proposed building materials/lumber storage use<sup>7</sup> would be allowable under CB zoning of the property.

11. DDES recommends approval of the requested rezone, subject to conditions that would regulate operations on the site:
  - A. Prior to placement of business stock materials on the property:
    - i. Installation of landscaping buffers pursuant to KCC 21A.16.060(A).
    - ii. A groundwater protection and drainage control plan submittal and approval by DDES.
    - iii. Updating of the King County Fire Marshal annual permit to reflect the proposed expansion of the lumber yard.
  - B. Restriction of vehicular access to the subject parcel to that via the existing lumberyard to the west (and therefore not directly from Cemetery Road). DDES states the undesirability of introducing commercial traffic to Cemetery Road. The Applicant noted that there is an existing, rarely used driveway cut immediately to the west of the site's frontage on Cemetery Road (on the adjacent Applicant property).
  - C. Lastly, DDES notes that future structural development may be subject to building permit requirements and P-suffix conditions.
12. DDES acknowledged at hearing that the proper zoning classification to be assigned in the requested rezone is not simply CB, but CB-P-SO (applying the proper P-suffix and special district overlay nomenclature). The Applicant stated a lack of objection to such revision.

#### KCC 20.24.190 Reclassification (Rezone) Approval Criteria

13. In addition to the basic rezone approval criteria set forth in KCC 21A.44.060 (see Conclusion 1 below), special rezone approval criteria are established in KCC 20.24.190.<sup>8</sup> The four special criteria, at least one of which must be met, are delineated in the following findings, with an assessment.
14. KCC 20.24.190(A) allows a rezone to be approved if “[t]he property is potentially zoned for the reclassification being requested and conditions have been met that indicate the reclassification is appropriate.” In this case, the record shows that the property is not potentially zoned for the reclassification. The property is zoned R-1-SO. That nomenclature indicates no formal potential for the requested CB zoning. DDES contends that criterion A “seemed to fit better” to the proposed rezone, opining that the special criteria structure of KCC 20.24.190 “doesn’t directly address this type of request (the rezone).” DDES then goes on to argue that the proposed rezone conforms to KCC 20.24.190(A) “in spirit” since DDES feels that the property is “potentially zoned in the sense that it is permitted within the comprehensive plan Rural Town designation,” and therefore DDES feels that the rezone meets the “intent” of the special criteria. This argument mixes apples and oranges and is unpersuasive. The requirement of a formal potential zone is explicit in the criterion. Comprehensive plan designations are not potential zones.

<sup>7</sup> The Applicant’s proposed use is under the Building, Hardware and Garden Materials zoning use classification.

<sup>8</sup> These rezone criteria apply to individual small area quasi-judicial rezone applications, not to legislative enactments.

15. Criterion B allows rezone approval if “[a]n adopted subarea plan or area zoning specifies that the property shall be subsequently considered through an individual reclassification application.” The evidence in this case does not show any such specification for the subject property.
16. Criterion C allows rezone approval in cases “[w]here a subarea plan has been adopted but subsequent area zoning has not been adopted, [and] the proposed reclassification or shoreline redesignation is consistent with the adopted subarea plan.” Although it can be seen herein that the proposed rezone is consistent with the adopted subarea plan, the proposal does not meet the first part of the criterion C test, that “a subarea plan has been adopted but subsequent area zoning has not been adopted.” The Vashon Town Plan was adopted through the enactment of Ordinance 12395 effective August 12, 1996. Formal “Vashon Town Plan Area Zoning” was enacted simultaneously in a later section of the same ordinance. Such zoning action, which immediately implemented the Town Plan, constitutes “subsequent area zoning” in the context that the term is used in KCC 20.24.190(C). (Both the Applicant and DDES acknowledged at hearing that subsequent area zoning had occurred.) Therefore, it cannot be concluded that “subsequent area zoning has not been adopted” in this case.
17. Lastly, criterion D allows individual rezone consideration if:

The applicant has demonstrated with substantial evidence that:

1. Since the last previous area zoning or shoreline environment designation of the subject property, authorized public improvements, permitted private development or other conditions or circumstances affecting the subject property have undergone substantial and material change not anticipated or contemplated in the subarea plan or area zoning;
2. The impacts from the changed conditions or circumstances affect the subject property in a manner and to a degree different than other properties in the vicinity such that area rezoning or redesignation is not appropriate. For the purposes of this subsection, “changed conditions or circumstances” does not include actions taken by the current or former property owners to facilitate a more intense development of the property including but not limited to changing tax limitations, adjusting property lines, extending services or changing property ownership;
3. For proposals to increase rural residential density (not applicable here), that the proposal meets the criteria in Comprehensive Plan policies R-205 through R-209;
4. For proposals to increase urban residential density (again, not applicable here), that the proposal meets the criteria in Comprehensive Plan policies U-120 through U-125; and
5. The requested reclassification or redesignation is in the public interest.

Individual rezone criterion D essentially incorporates the “changed circumstances” test long established by Washington case law, but with codified articulations of particular standards and

specifications of such circumstances, as well as specific plan policy conformity requirements not applicable here and the standard traditional summary rezoning approval test that a rezoning be in the public interest. The Applicant has not made a case,<sup>9</sup> and DDES has not analyzed the proposal, for qualification under the criterion D “changed circumstances” test. The record has an insufficient fact presentation for the Examiner to adequately consider, much less find, qualification under Criterion D at present.

## CONCLUSIONS:

### Rezoning Analysis

1. Basic county code rezoning criteria are set forth in KCC 21A.44.060:

A zone reclassification shall be granted only if the applicant demonstrates that the proposal complies with the criteria for approval specified in K.C.C. Title 20.24.180 and 20.24.190 and is consistent with the Comprehensive Plan and applicable community and functional plans.

2. As reviewed in detail above in the above findings, KCC 20.24.190 establishes special criteria for the review of rezoning applications.
3. Rezoning proposals are also addressed by Washington case law:

The following general rules apply to rezoning applications: (1) there is no presumption of validity favoring the action of rezoning; (2) the proponents of the rezoning have the burden of proof in demonstrating that conditions have changed since the original zoning; and (3) the rezoning must bear a substantial relationship to the public health, safety, morals, or welfare.

[*Citizens v. Mount Vernon*, 133 Wn.2d 861, 874-75, 947 P.2d 1208 (1997), citing *Parkridge v. Seattle*, 89 Wn.2d 454, 462, 573 P.2d 359 (1978)] The courts have also held that a rezoning which serves to implement the adopted comprehensive plan need not meet the “changed circumstances” portion of the *Parkridge* test. [*SORE v. Snohomish County*, 99 Wn.2d 363, 370-371, 662 P.2d 816 (1983); *Bjarnson v. Kitsap County*, 78 Wn. App. 840, 846, 899 P.2d 1290 (1995)]<sup>10</sup>

4. An effect of the KCC 20.24.190 special rezoning criteria is that until reviewed again as part of legislative area zoning consideration, the established zoning that was enacted in direct comprehensive plan implementation is with few exceptions presumed to be intentionally final,

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<sup>9</sup> In testimony, the Applicant expressed a belief of non-qualification under criterion D and its requirement of changed circumstances because the *subarea plan* and *zoning* in the area had remained unchanged since adoption. These regulatory changes are not the types of changes contemplated under the criterion; the qualifying changes contemplated are more the physical, infrastructural, social and/or activity changes, etc., *i.e.*, “authorized public improvements, permitted private development or other conditions or circumstances affecting the subject property have undergone substantial and material change not anticipated or contemplated...” (KCC 20.24.190.D.1); in other words, actual changes “on the ground” or otherwise having a material effect (rather than land use regulatory changes) that have occurred since the last zoning enactments. (The parties should be sure to consult and review the actual wording of the criterion and its express standards rather than just the Examiner’s summary review comment here).

<sup>10</sup> The *SORE* holding which preempted the *case law* “changed circumstances” test upon a showing of plan conformity does not preempt the enactment of countervailing local rezoning criteria, however. The “special circumstances” test of KCC 20.24.190.D would not be preempted by Washington case law in the event of comprehensive plan conformity; if necessary to approval of a rezoning under KCC 20.24.190, criterion D must be met in full even if plan conformity is shown.

regardless whether a reclassification would also conform to the plan. Only in cases where a property is: i) expressly specified to be subject to further rezone consideration through formal potential zoning (criterion A) or by being called out specifically for subsequent rezone consideration by a plan (criterion B); ii) in an area where there did not occur a legislative zoning enactment to implement a plan (criterion C); or iii) supported by qualifying changed circumstances (criterion D), is rezoning on an individual basis permitted. In all other cases, rezoning must be undertaken through the legislative area rezoning process.

5. The upshot of the special criteria in this case is that unless qualification under KCC 20.24.190(A), (B) or (C) is shown, the rezone proposal must be supported by evidence demonstrating compliance with criterion D, including its requirement of a showing of qualifying changed circumstances, in order to be approved. As seen in the above findings, qualification under criteria A, B or C has not been demonstrated in the record, and therefore only qualification under the particular changed circumstances test of criterion D remains possible.
6. As noted above, DDES opined in testimony that the special criteria of KCC 20.24.190 do not “directly address this type of request.” But the criteria *only* address “this type of request” (a zone reclassification) and shoreline reclassifications, so the opinion seems not to be grounded in the reality of the county’s enacted land use regulatory scheme. Rather than providing an exemption from the criteria as DDES implies by such comment, or suggesting a loosening of them, an asserted lack of close fit with the criteria instead shows that the proposal has at this point failed to *meet* the criteria. In other words, lacking a close fit does not render the *criteria* inapplicable, it instead shows that the *proposal* may not meet the criteria and thus not merit approval as an individually considered rezone.
7. The remedies for rezone approval available to the Applicant are two: a) reconsider the application and make a persuasive showing of changed circumstances in order to qualify under KCC 20.24.190(D); or b) endeavor to have the proposal addressed via a legislative area rezone.

#### Remaining Rezone Approval Tests

8. Rezoning of the property to CB-P-SO would conform to the comprehensive plan. In particular, it would conform to the Rural Town land use designation applied to the subject area of Vashon Island.
9. A rezone to CB-P-SO would comply with the VS-P-29 P-suffix condition (which, as the land use regulatory scheme stands at present, would also pertain to any future development of the site).
10. In general, conformity of a rezone to the applicable comprehensive plan and code requirements would be tantamount to its “bear[ing] a substantial relationship to the public welfare,” since the comprehensive plan and implementing regulations are the most direct expression of public policy in the topical area of land use. Except for its noncompliance with the special rezone criteria noted above, there is no evidence or argument in the record which suggests that the requested rezone is not in support of the public necessity, convenience and general welfare.

#### Summary Rezone Conclusion

11. The requested rezone has not been shown to date to meet the applicable approval tests and cannot be recommended to be approved. However, as conformity with KCC 20.24.190(D) may

be able to be demonstrated by substantial evidence,<sup>11</sup> the appropriate means of disposition is to remand the matter to DDES to allow the Applicant to supplement the application and DDES to then conduct a supplemental analysis of rezone conformity.

#### Recommended Conditions

12. To properly provide for the public health, safety and general welfare in the rezoning action, the Cemetery Road access prohibition recommended by DDES as a condition should be revised to allow an exception for controlled emergency access directly from Cemetery Road.
13. The general condition recommended by DDES regarding building permit requirements and regulatory P-suffix compliance by any future development proposal was acknowledged by DDES at hearing to be a “catch-all” condition. The Examiner concludes that with one exception it is superfluous: In general, whatever policy and regulatory provisions which may apply to future development would apply regardless of express conditions of this rezone approval. The exception is that it is appropriate to articulate as a condition of approval that the P-suffix and SO nomenclature (resulting in “CB-P-SO”) is attached to the resulting zone classification to reiterate that development of the property is subject to the VS-P29 P-suffix regulation and the Special District Overlay.

#### ORDER:

The application is remanded to the Applicant and the Department of Development and Environmental Services (DDES) for reconsideration pursuant to the above findings and conclusions prior to return to hearing.

ORDERED February 5, 2009.

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Peter T. Donahue  
King County Hearing Examiner

#### NOTICE OF RIGHT TO APPEAL

In order to appeal this order of the Examiner, written notice of appeal must be filed with the Clerk of the Metropolitan King County Council with a fee of \$250.00 (check payable to King County Office of Finance) ***on or before February 19, 2009***. If a notice of appeal is filed, the original and six (6) copies of a written appeal statement specifying the basis for the appeal and argument in support of the appeal must be filed with the Clerk of the King County Council ***on or before February 26, 2009***. Appeal statements may refer only to facts contained in the hearing record; new facts may not be presented on appeal.

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<sup>11</sup> The Examiner has no prejudgments on the issue, pro or con. It awaits evidence. The parties should be sure not to take this suggestion of possible conformity as an indication of a probable recommendation of approval (or disapproval, for that matter).



Filing requires actual delivery to the Office of the Clerk of the Council, Room 1025, King County Courthouse, 516 3<sup>rd</sup> Avenue, Seattle, Washington 98104, prior to the close of business (4:30 p.m.) on the date due. Prior mailing is not sufficiently timely if actual receipt by the Clerk does not occur within the applicable time period.

If a written notice of appeal and filing fee are not filed within fourteen (14) calendar days of the date of this report, or if a written appeal statement and argument are not filed within twenty-one (21) calendar days of the date of this report, the order of remand by the hearing examiner contained herein shall stand as issued.

MINUTES OF THE OCTOBER 16, 2008, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L08TY402

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Mark Mitchell, representing the Department, Michael Bradley, representing the Applicant and Loren Sinner, the Applicant.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	Land Use Permit Application Form received April 9, 2008
Exhibit No. 2	Rezone Application received April 9, 2008
Exhibit No. 3	SEPA Environmental Checklist received April, 9, 2008
Exhibit No. 4	DDES Preliminary Report and Recommendation
Exhibit No. 5	Seven color photographs showing the site, buildings and structures received April 9, 2008
Exhibit No. 6	Affidavit of Posting
Exhibit No. 7	Notice of application published in the Seattle Times and Vashon Beachcomber on June 4, 2008
Exhibit No. 8	Notice of October 16, 2008 hearing dated September 19, 2008
Exhibit No. 9	Declaration of Non-Significance mailed September 15, 2008
Exhibit No. 10	Notice of decision and SEPA Threshold Determination Recommendation, transmitted September 15, 2008
Exhibit No. 11	Site plans received April 9, 2008
Exhibit No. 12	Assessors map
Exhibit No. 13	Letter to Mr. Sinner and Mr. Bradley from Vashon Maury Island Chamber of Commerce dated October 14, 2008

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